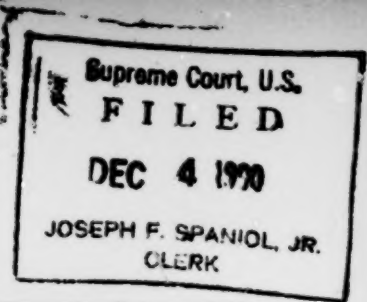


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90-1007

No.



In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION,
Petitioner,

v.

SUPERIOR COURT OF THE CITY AND COUNTY
OF SAN FRANCISCO
Respondent.

(GEORGE WALTERS, REAL PARTY IN INTEREST)

**PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT**

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QUESTION PRESENTED

1. Whether state law claims brought by an officer of a national bank are preempted and barred by the dismissal provisions of the National Bank Act where the officer was appointed by the Board of Directors and terminated by a duly authorized delegate of the Board of Directors.

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SUPERIOR COURT OF THE CITY AND COUNTY
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(GEORGE WALTERS, REAL PARTY IN INTEREST)

**PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT**

The petitioner respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, First Appellate District, filed on July 17, 1990.

OPINIONS BELOW

The opinion of the Superior Court for the City and County of San Francisco denying Petitioner's Motion for Summary Judgment was not reported. A copy of the Order is attached to this Petition as Appendix A.

The opinion of the California Court of Appeal denying the Petition for Writ of Mandate was not reported. A copy of the Order is attached to this Petition as Appendix B.

The California Supreme Court denied review of the Order of the Court of Appeal in this matter on September 6, 1990. A copy of the Order of Denial is attached to this Petition as Appendix C.

JURISDICTION

The order of the Superior Court of the City and County of San Francisco was filed on May 15, 1990. The order of the California Court of Appeal was filed on July 17, 1990. The California Supreme Court denied review on September 6, 1990, at which time the opinion of the Superior Court became final and reviewable by this Court. California Rules of Court, rules 24(a), 25(a), 28(f). This Petition for Writ of Certiorari followed within 90 days of the latter date. Supreme Court Rules, Rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).¹

¹ In *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963), the U.S. Supreme Court considered whether it had jurisdiction over a state court's interpretation of the venue provisions of the National Bank Act. The state court's interpretation did not preclude the Bank from prevailing on the merits of the claims against it. However, because the issue presented involved a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action," the U.S. Supreme Court decided that it would serve "the policy underlying the requirement of finality" to adjudicate the state court's interpretation of the National Bank Act *before* the case proceeded to a full trial on the merits. *Id.* at 558. See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-84 (1974).

The instant case also involves an interpretation of the National Bank Act on an issue that is "separate and independent" from the merits of Plaintiff's claims. Furthermore, adjudication of this claim at this time could eliminate "long and complex litigation" which would "be for naught" if the state court's interpretation of the National Bank Act is held to be incorrect. *Mercantile National Bank, supra*, at 558. Accordingly, it is appropriate for the court to exercise jurisdiction over this issue at this time.

FEDERAL STATUTE INVOLVED

The National Bank Act, 12 U.S.C § 24 provides, in pertinent part:

[A] national banking association . . . shall have power . . .

* * *

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, bylaws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

STATEMENT OF THE CASE

A. Procedural History.

On October 9, 1987, George Walters filed a Complaint in the Superior Court for the City and County of San Francisco alleging the following causes of action:

- a. First Cause of Action—Misrepresentation, Fraud, Deceit.
- b. Second Cause of Action—Breach of Statutory Obligation (Labor Code §§ 970 and 972).
- c. Third Cause of Action—Tortious Breach of Covenant of Good Faith and Fair Dealing.
- d. Fourth Cause of Action—Breach of Oral Contract.
- e. Fifth Cause of Action—Breach of Implied in Fact Promise.
- f. Sixth Cause of Action—Wrongful Termination/Discharge.

g. Seventh Cause of Action—Breach of Statutory Obligation (Labor Code §§ 201 and 203).

h. Eighth Cause of Action—Intentional Infliction of Emotional Distress.

i. Ninth Cause of Action—Negligent Infliction of Emotional Distress.

After filing responsive pleadings and engaging in discovery, Petitioner filed a Motion for Summary Adjudication of Issues, pursuant to California Code of Civil Procedure 437c, seeking dismissal of the first, second, third, fourth, fifth, sixth, eighth, and ninth causes of action. In this motion, Petitioner contended that the National Bank Act preempted and barred Walters' claims.

Judge Pollak of the Superior Court denied summary adjudication of all issues presented in the Bank's motion. The only basis for the court's ruling was that the Bank's "... moving papers fail to establish that the termination of plaintiff was approved or ratified by the Board of Directors or an Executive Committee of the Board, so that the termination does not come under the National Bank Act, 12 U.S.C. Section 24 (Fifth)." (See Appendix A.)

Petitioner sought review of this Order by a Petition for Writ of Mandate filed April 24, 1990. On July 17, 1990, after requesting and receiving opposition and reply papers from the parties, the Court of Appeal summarily denied the Writ. (See Appendix B.) On July 27, 1990, Petitioner sought review of the Court of Appeal Order. The California Supreme Court denied review by Order dated September 6, 1990. (See Appendix C.)

B. Statement of Facts.

Walters was hired by Petitioner in March 1986. On April 29, 1986, the Board of Directors appointed Walters as an officer of the Bank with the title of Vice President. Walters continued to hold the officer title of Vice President until the termination of his employment.

Article V of Petitioner's Bylaws provide that "officers of the Association shall be ... one or more Vice Presidents ..." The

Bylaws also provide that "officers shall be appointed by the Board of Directors . . . and shall hold office at the pleasure of the Board . . ." Both of these provisions were in effect when Walters was made an officer of the Bank and when his employment was terminated.

On April 29, 1986, pursuant to Article V, Section 3 of the Bylaws,² the Bank's Board of Directors passed a resolution delegating authority to its Executive Vice Presidents "to demote, suspend, remove, or dismiss all officers and other employees beneath the rank of Executive Vice President".

In December 1986, Executive Vice President Clyde R. Claus decided to close the unit in which Walters worked and authorized the termination of Walters' employment. Accordingly, Walters was terminated at the direction of Mr. Claus effective February 17, 1987.

REASONS FOR GRANTING THE WRIT

The importance of the issues raised by this Petition cannot be overstated. At stake in this case for Petitioner as well as for every other national bank in California is the viability of the right to terminate officers "at will" granted by the National Bank Act, 12 U.S.C. 24 (Fifth) to federally chartered banks regardless of the state in which they are located. This right to dismiss officers at will reflects the conscious effort of Congress to ensure that federally chartered financial organizations have uniform power to deal immediately with employment related situations at the officer level.

A. The Decision of the Trial Court Frustrates the Purpose of the National Bank Act.

The trial court's decision in this case destroys Congress' effort to establish uniformity among national banks. It does so by

² The pertinent part of Article V, Section 3 of the Bylaws reads as follows: "The duties and authority of officers of the Association, other than as set forth in these Bylaws, shall be prescribed and established by the Board of Directors or the Executive Committee."

requiring national banks in California to show that the Board of Directors independently assessed and approved the termination of a Bank officer. Without such a showing, the at will standard of the National Bank Act cannot be invoked as a defense.

The imposition of this requirement distinguishes national banks doing business in California from national banks in the rest of the country.³ Moreover, because the decision is a marked departure from the rulings of the federal courts, it gives bank officers suing in the California state courts more rights than officers suing in the California federal courts. Thus, officers discharged from the same bank in California would have different legal standards applied to their terminations depending upon the court in which they filed their claims. This eliminates any possibility of uniformity among the federally chartered banks and runs afoul of Congress' attempt to create one standard of employment for all bank officers.

Furthermore, in holding that an officer is not employed at will unless he is terminated by the Board of Directors, the trial court made an incorrect and dangerous assumption: that being an "officer" and being "at will" are severable concepts. This is simply not true. The National Bank Act does not empower banks to appoint officers to transact business who are not at will

³ See, e.g., *Mackey v. Pioneer National Bank*, 867 F.2d 520 (9th Cir. 1989); *Westervelt v. Mohrenstecher*, 76 F. 118 (8th Cir. 1896); *Holland v. Bank of America*, 673 F. Supp. 1511 (S.D. Cal. 1987); *Mahoney v. Crocker National Bank*, 571 F.Supp. 287 (N.D. Cal. 1983); *Kozlowsky v. Westminster National Bank*, 6 Cal. App.3d 593 (1970); *Cox v. First National Bank of Brea*, 10 Cal. App.2d 302 (1935); See also cases interpreting analogous federal statutes creating "at will" employment in other federally chartered financial institutions, *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093 (9th Cir. 1981), cert. den., 456 U.S. 948; *Inglis v. Feinerman*, 701 F.2d 97 (9th Cir. 1983), cert. den., 464 U.S. 1040; *Alegria v. Idaho First National Bank*, 723 P.2d 858 (Idaho 1986); *Ambro v. American National Bank & Trust Co. of Michigan*, 394 N.W.2d 46 (Mich.App. 1986); *McGeehan v. Bank of New Hampshire Nat. Ass'n*, 455 A.2d 1054 (New Hampshire 1983); *Kemper v. First National Bank in Newton*, 418 N.E.2d 819 (Ill.App. 1981).

employees.⁴ Rather, being employed at will is a consequence of being employed as an officer of a national bank.

Under the trial court's reading of the Act, however, officers are limited to those individuals who are both appointed *and terminated* by the Board of Directors. Thus, officer status cannot be determined until the employee is terminated. By this analysis, an employee could be appointed an officer, transact business as an officer, commit the Bank to obligations as an officer, but not truly be an officer because his termination was not effected by direct action of the Board of Directors. All business transactions requiring officer approval entered into by this officer, therefore, would be subject to rescission or an ultra vires challenge. Thus, by prohibiting banks from conveying officer status until the moment of termination, the trial court's decision raises a dismaying array of possibilities which could impact the enforceability of existing agreements and commitments and raise challenges which could threaten the financial integrity of affected banks. This defeats the very purpose of the National Bank Act which is designed to enhance the financial security of financial institutions, not detract from it.

B. The Dismissal Powers Granted by the National Bank Act can be Delegated By the Board of Directors.

In this case, the trial court did not find any factual dispute as to whether Walters was an officer of the Bank. Rather, the motion was denied solely because the decision to terminate Walters' employment was made by a delegate of the Board of Directors. The court found that since the Board did not directly order the termination, the dismissal provisions of the National Bank Act could not be raised as a bar to Walters' claims.

⁴ In fact, the courts have consistently interpreted the National Bank Act as prohibiting national banks from entering into contracts with bank officers for any employment relationship other than one which is at will. *Mackey v. Pioneer National Bank*, *supra*; *Trujillo v. FDIC*, 3 IER Cases 38 (C.D. Cal. 1988); *Kozlowsky v. Westminster National Bank*, *supra*; *Cox v. First National Bank*, *supra*; *McGeehan v. Bank of New Hampshire*, *supra*.

This ruling directly contradicts well established precedent of the federal and state courts. These courts have allowed the boards of directors of national banks to delegate the power to terminate bank officers to other persons within corporate structure of the national bank. *Mackey v. Pioneer National Bank*, *supra*, 820 F.2d at 525 (bank officers may be hired directly or indirectly through delegation by the Board of Directors, and may be terminated "at will" by delegate of Board, in this case an Executive Committee of the Board); *Mahoney v. Crocker National Bank*, *supra*, 571 F.Supp. at 290-91 (board of directors may assign the right to dismiss officers at pleasure to other persons within the corporate structure); *Holland v. Bank of America*, 673 F.Supp. 1511, 1516 (S.D.Cal. 1987) (National Bank Act preempts plaintiff's claims even though a delegate of board of directors carries out appointments and dismissals).

The reasoning of these cases is sound and is supported by the express language of the National Bank Act. Section 24 (Sixth) provides that the Board may specify the manner in which "its officers are appointed . . . its general business conducted and the privileges granted to it by law exercised and enjoyed." Since no words of proscription are used, this language must be read as expansive.

One of the "privileges" granted to national banks is the right to terminate officers at pleasure. In this case, Petitioner's Board of Directors prescribed how the termination "privilege" would be exercised. In accordance with its bylaws, the Board passed a resolution granting to its Executive Vice Presidents the authority to terminate Bank officers. Since Petitioner established through undisputed facts that Walters' employment was terminated by an Executive Vice President who had delegated authority from the Board of Directors to dismiss Bank officers, the dismissal provisions of the National Bank Act were met and summary adjudication for Petitioner should have been granted. The trial court's failure to do so and the Court of Appeal's refusal to overturn this decision are inconsistent with established case law and statutory authority. Action by this court is necessary, therefore, to resolve this conflict and to restore uniformity to the interpretation of the National Bank Act among the state and federal courts.

CONCLUSION

The National Bank Act gives federally chartered banks the unfettered right to terminate officers at will. 12 U.S.C. 24 (Fifth). It also expressly allows the Board of Directors of such banks to specify the manner in which this right shall be exercised. 12 U.S.C. 24 (Sixth). The ruling of the Superior Court in this case not only ignores these provisions, but also implies an obligation that the Board of Directors review and approve every officer level termination. This requirement directly contradicts the clear language of the National Bank Act as well as the rulings of other state and federal courts on this same issue.

This clear break with the historical interpretation of the dismissal provisions of the National Bank Act cannot be allowed without destroying the very purpose of the Act: to ensure uniformity among federally chartered banks. There can be no such uniformity if California bank officers are subject to a different legal standard than officers in other states. Nor can there be uniformity if officers suing in state court have different rights from officers suing in federal courts under the same federal statute. This court, therefore, should seize this opportunity to resolve the conflict that has been created by the Superior Court's ruling in this case and restore a uniform interpretation of the National Bank Act. Accordingly, Petitioner respectfully requests that its Petition for a Writ of Certiorari be granted.

Dated: December 3, 1990

HELLER, EHRMAN, WHITE &
MCAULIFFE

By PATRICIA K. GILLETTE
Attorney for Petitioner

Appendix A

**Bianco, Brandi & Jones
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Attorneys for Plaintiff:
George Walters**

**Superior Court Of The State Of California
City And County Of San Francisco**

**George Walters,
Plaintiff,**

v.

**Terry Roussel, et al.,
Defendants.**

Case No. 882 567

Order Re Motion For Summary Adjudication Of Issues

The motion of defendant Bank of America NT & SA for summary adjudication came on regularly for hearing on February 23, 1990 in Department 8, the Honorable Stuart Pollack presiding. Patricia Radez appeared as attorney for defendant Bank of America NT & SA; Stephen M. Murphy appeared on behalf of plaintiff George Walters. Having reviewed the papers submitted by both sides and hearing oral argument,

IT IS HEREBY ORDERED that the motion of defendant Bank of America NT & SA for summary adjudication of issues be denied in its entirety. Defendant's moving papers fail to establish that the termination of plaintiff was approved or ratified by the Board of Directors or an Executive Committee of the Board, so that the termination does not come under the National Bank Act, 12 U.S.C. § 24 (fifth).

DATED: March 26, 1990

**STUART R. POLLAK
Judge Of The Superior Court**

Approved as to Form:

**PATRICIA S. RADEZ
Attorney for Defendant
Bank of America, NT & SA**

Appendix B

Court of Appeal of the State of California

in and for the

First Appellate District

Division One

No. A049425

San Francisco Superior Court 882567

**Bank of America National Trust and Savings Assn.,
Petitioner,**

vs.

**Superior Court, San Francisco Co.,
Respondent,**

**George Walters,
Real Party in Interest.**

[Filed July 17, 1990]

By the Court:

The petition for writ of mandate and request for stay are
denied.

Dated July 17, 1990

RACANELLI, P. J.

Appendix C

No. A049425-S016761

In the Supreme Court
of the State of California

IN BANK

[Filed September 6, 1990]

Bank of America National Trust & Savings Assn.,
Petitioner,

v.

Superior Court of the County of San Francisco,
Respondent;

George Walters,
Real Party in Interest

Application for stay and petition for review DENIED.
Lucas, C.J. and Panelli, J. did not participate.

BROUSSARD
Acting Chief Justice